Chapter X

PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

A. Introduction

139. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic.[1267]

140. At its sixty-sixth session (2014), the Commission considered the preliminary report of the Special Rapporteur.[1268] At its sixty-seventh session (2015), the Commission considered the second report of the Special Rapporteur[1269] and took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee.[1270]

B. Consideration of the topic at the present session

141. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/700), which it considered at its 3318th to 3321st and 3324th meetings, from 12 to 15 July and on 20 July 2016.

142. In her third report, the Special Rapporteur focused on identifying rules of particular relevance to post-conflict situations, while also addressing some issues relating to preventive measures to be undertaken in the pre-conflict phase, as well as the particular situation of indigenous peoples (chapter II). The Special Rapporteur proposed three draft principles on preventive measures,[1271] five draft principles concerning the post-conflict phase[1272] and one draft principle on the rights of indigenous peoples, placed in Part Four of the draft principles.[1273] In her report,

---

[1267] The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (see *Yearbook … 2013*, vol. II (Part Two), para. 167). For the syllabus of the topic, see *Yearbook … 2011*, vol. II (Part Two), annex V.

[1268] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674; see also *ibid*., vol. II (Part Two), pp. 154 *et seq.*, paras. 187–222.

[1269] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/685; see also *ibid*., vol. II (Part Two), pp. 64 *et seq.*, paras. 132–170.

[1270] A/CN.4/L.870 (available from the Commission's website, documents of the sixty-seventh session); see also *Yearbook … 2015*, vol. II (Part Two), pp. 64–65, para. 134.

[1271] The text of draft principles I-1, I-3 and I-4, as proposed by the Special Rapporteur in her third report, reads as follows:

"Draft principle I-1

"*Implementation and enforcement*

"States should take all necessary steps to adopt effective legislative, administrative, judicial or other preventive measures to enhance the protection of the natural environment in relation to armed conflict, in conformity with international law.

"Draft principle I-3

"*Status-of-forces and status of mission agreements*

"States and international organizations are encouraged to include provisions on environmental regulations and responsibilities in their status-of-forces or status of mission agreements. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

"Draft principle I-4

"*Peace operations*

"States and organizations involved in peace operations shall consider the impacts of those operations on the environment and take all necessary measures to prevent, mitigate and remediate the negative environmental consequences thereof."

[1272] The text of draft principles III-1 to III-5, as proposed by the Special Rapporteur in her third report, reads as follows:

"Draft principle III-1

"*Peace agreements*

"Parties to a conflict are encouraged to settle matters relating to the restoration and protection of the environment damaged by the armed conflict in their peace agreements.

"Draft principle III-2

"*Post-conflict environmental assessments and reviews*

"1. States and former parties to an armed conflict are encouraged to cooperate between themselves and with relevant international organizations in order to carry out post-conflict environmental assessments and recovery measures.

"2. Reviews at the conclusion of peace operations should identify, analyse and evaluate any environmentally detrimental effects of those operations on the environment, in an effort to mitigate or remedy those detrimental effects in future operations.

"Draft principle III-3

"*Remnants of war*

"1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps, explosive ordnance and other devices shall be cleared, removed, destroyed or maintained in accordance with obligations under international law.

"2. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

"Draft principle III-4

"*Remnants of war at sea*

"1. States and international organizations shall cooperate to ensure that remnants of war do not constitute a danger to the environment, public health or the safety of seafarers.

"2. To this end States and organizations shall endeavour to survey maritime areas and make the information freely available.

"Draft principle III-5

"*Access to and sharing of information*

"In order to enhance the protection of the environment in relation to armed conflicts, States and international organizations shall grant access to and share information in accordance with their obligations under international law."

[1273] The text of draft principle IV-1, as proposed by the Special Rapporteur in her third report, reads as follows:

"Draft principle IV-1

"*Rights of indigenous peoples*

"1. The traditional knowledge and practices of indigenous peoples in relation to their lands and natural environment shall be respected at all times.

"2. States have an obligation to cooperate and consult with indigenous peoples, and to seek their free, prior and informed consent in connection with usage of their lands and territories that would have a major impact on the lands."

the Special Rapporteur also provided a brief analysis of the work conducted so far and made some suggestions for the future programme of work on the topic (chapter III).

143. At its 3324th meeting, on 20 July 2016, the Commission referred draft principles I-1, I-3, I-4, III-1 to III-5, and IV-1, as contained in the third report of the Special Rapporteur, to the Drafting Committee.

144. At the same meeting, the Commission also decided to refer back to the Drafting Committee the draft introductory provisions and draft principles contained in the report of the Drafting Committee that the Commission had taken note of during its previous session[1274] to address some technical issues in the text involving the use of brackets and some inconsistencies regarding the terminology employed.

145. At its 3337th and 3342nd meetings, on 5 and 9 August 2016 respectively, the Chairperson of the Drafting Committee presented[1275] two reports of the Drafting Committee on "Protection of the environment in relation to armed conflicts". The first contained the draft introductory provisions and draft principles taken note of by the Commission during the sixty-seventh session (2015), which had been renumbered and revised for technical reasons by the Drafting Committee (A/CN.4/L.870/Rev.1). The Commission provisionally adopted draft principles 1, 2, 5 [I-x], 9 [II-1], 10 [II-2], 11 [II-3], 12 [II-4] and 13 [II-5] (see sect. C.1 below). At its 3344th meeting, on 10 August 2016, the Commission adopted the commentaries to the draft principles provisionally adopted at the present session (see sect. C.2 below).

146. The second report contained draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee at the present session (A/CN.4/L.876). The Commission took note of the draft principles as presented by the Drafting Committee.[1276] It is anticipated that commentaries to the draft principles will be considered at a future session.

[1274] A/CN.4/L.870 (see footnote 1270 above).

[1275] The statements of the Chairperson of the Drafting Committee are available from the website of the Commission (http://legal.un.org/ilc).

[1276] The text of the draft principles provisionally adopted by the Drafting Committee reads as follows:

"Introduction

" […]

"Part One

"*General principles*

"Draft principle 4

"*Measures to enhance the protection of the environment*

"1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.

"2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict.

" […]

"Draft principle 6

"*Protection of the environment of indigenous peoples*

"1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.

"2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

"Draft principle 7

"*Agreements concerning the presence of military forces in relation to armed conflict*

"States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

"Draft principle 8

"*Peace operations*

"States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.

"Part Two

"*Principles applicable during armed conflict*

" […]

"Part Three

"*Principles applicable after an armed conflict*

"Draft principle 14

"*Peace processes*

"1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.

"2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

"Draft principle 15

"*Post–armed conflict environmental assessments and remedial measures*

"Cooperation among relevant actors, including international organizations, is encouraged with respect to post–armed conflict environmental assessments and remedial measures.

"Draft principle 16

"*Remnants of war*

"1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.

"2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

"3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

"Draft principle 17

"*Remnants of war at sea*

"States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

"Draft principle 18

"*Sharing and granting access to information*

"1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.

"2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances."

1. Introduction by the Special Rapporteur of the third report

147. The Special Rapporteur stated that the main purpose of the third report was to identify rules of particular relevance in post-conflict situations, and also to address some preventive measures that had not been dealt with in the previous reports. She recalled that the preliminary report[1277] had provided an overview of pertinent rules and principles applicable to a potential armed conflict (pre-conflict phase) and that the second report[1278] had identified existing rules of armed conflict directly relevant to the protection of the environment during armed conflict. The three reports sought to provide an overview of the applicable law before, during and after an armed conflict (phases I, II and III, respectively) in an attempt to close the circle of the three temporal phases. She observed that there were no clear-cut boundaries between the various phases and that it was important to read the reports together for a proper understanding of the topic.

148. The third report did not attempt to undertake a comprehensive review of international law in general, but examined specific conventions and legal issues that were of particular relevance to the topic. It addressed, *inter alia*, pertinent aspects with regard to conventions on legal liability, international investment agreements, rights of indigenous peoples, remnants of war, and the practice of States in the form of peace agreements and status of forces and status of mission agreements. One section was dedicated to the practice of international organizations, with special emphasis on the United Nations Environment Programme (UNEP). In addition, the Special Rapporteur indicated that the report provided a brief recapitulation of discussions within the Commission at its previous session, together with information on the views and practice of States and select case law. She noted, however, that, similarly to the findings in the second report, the case law in this area rarely covered environmental harm in and of itself; the harm covered almost always took the form of damage to natural resources or property. The Special Rapporteur further highlighted the section of the report that addressed the question of access to and sharing of information and the obligation to cooperate (paras. 130–152), which she considered of particular importance for all three phases of the topic.

149. The report contained proposals for nine draft principles. Three draft principles were proposed for Part One, which primarily concerned preventive measures (pre-conflict phase). Draft principle I-1 addressed the need for States to adopt legislative, administrative, judicial or other preventive measures at the domestic level to enhance protection of the environment. The draft principle was short and general in nature. Draft principle I-3 reflected the emerging trend among States and organizations to address environmental matters in status of forces and status of mission agreements. Draft principle I-4 dealt with the environmental consequences of peace operations and the importance of taking the necessary measures to prevent, mitigate and remediate any negative impact of such operations.

150. Five draft principles were proposed for Part Three, which related to post-conflict measures. Draft principle III-1 addressed peace agreements, which, it was noted, increasingly regulate environmental questions. Draft principle III-2 concerned the need to undertake post-conflict environmental assessments and reviews and consisted of two paragraphs. While paragraph 1 encouraged cooperation among States and former parties to an armed conflict for this purpose, including with States that were not parties to the conflict, paragraph 2 dealt with steps to be taken after the conclusion of a peace operation. The purpose of the draft principle was not to attribute responsibility, but rather to ensure that assessments and recovery measures could be undertaken. Draft principles III-3 and III-4 dealt with remnants of war and remnants of war at sea, respectively. Draft principle III-3 was general in nature and primarily reflected obligations that already exist under the law of armed conflict. The emphasis was on the need to act without delay and to cooperate to eliminate threats posed by remnants of war. Draft principle III-4 specifically addressed remnants of war at sea. The Special Rapporteur observed that those remnants were not directly regulated under the law of armed conflict and entailed particular complexities in the light of the different legal statuses of various maritime zones. The two draft principles aimed to cover all types of remnants that constituted a threat to the environment. Draft principle III-5 concerned the need for States and international organizations to grant access to and share information in order to enhance the protection of the environment. These were seen as essential requirements to ensure effective cooperation.

151. One draft principle was proposed for Part Four. Draft principle IV-1 reflected the present legal status of indigenous peoples and their lands and territories under relevant international legal instruments and case law. The Special Rapporteur foresaw that more draft principles could be added to this part.

152. The Special Rapporteur further drew attention to certain issues that the third report did not cover, including the Martens clause and issues relating to occupation, and observed that the Commission might wish to consider these matters in its future work on the topic. In addition, she highlighted several other issues that might be pertinent for the topic, such as questions on responsibility and liability, as well as the responsibility and practice of non-State actors and organized armed groups in non-international armed conflicts. The Special Rapporteur also observed that it might be appropriate to include a clear reference in a future preamble to the Commission's articles on the effects of armed conflicts on treaties,[1279] which was of particular relevance for the present topic.

153. Finally, the Special Rapporteur encouraged continued consultations with other entities, such as the ICRC, UNEP and other relevant parts of the United Nations system and regional organizations, and pointed out that the Commission might find it useful to continue to receive information from States on national legislation and case law relevant to the topic.

[1277] A/CN.4/674 (see footnote 1268 above).

[1278] A/CN.4/685 (see footnote 1269 above).

[1279] General Assembly resolution 66/99 of 9 *December* 2011, annex; for the draft articles adopted by the Commission and commentaries thereto, see *Yearbook … 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101.

2. Summary of the debate

(a) *General comments*

154. The importance of the topic was reiterated by some members, noting not only its contemporary relevance but also the challenges it presented, in particular since it sat at a cross-section of various legal fields. The fact that the Special Rapporteur, through her reports, had treated the three temporal phases as equally important had contributed to the development of the topic. While some members acknowledged the purpose of the third report, they also observed that its structure had made it difficult to clearly discern the relevance of the materials presented with regard to the intended temporal phase. In this regard, the view was expressed that it was necessary to distinguish clearly between the three temporal phases and to identify the law applicable in each of them. To facilitate consideration of the topic, a suggestion was made that the pre-conflict and post-conflict phases be limited to the periods immediately before and immediately after hostilities, respectively.

155. While some members welcomed the wealth of materials included in the report, other members observed that it was too extensive and included information that was of limited relevance. This had made it difficult to obtain a proper understanding of the direction the topic was taking. It would have been better if the report had provided an extensive analysis of the relevant materials upon which the draft principles were based, thereby justifying their content.

156. Some members agreed with the Special Rapporteur that an examination of all environmental treaties to determine their continued applicability during armed conflict was not warranted. It was recalled that the Commission had already studied this question in the context of its work on the articles on the effects of armed conflicts on treaties. Environmental agreements featured in the indicative list of treaties, the subject matter of which implied that they continued in operation. The articles and the commentaries thereto were certainly relevant to the current topic.[1280]

157. Caution was expressed by some members against an attempt to simply transpose peacetime obligations to the protection of the environment in relation to armed conflict. While it was acknowledged that it was unnecessary to examine the continued applicability of every environmental law treaty during armed conflict, such an exercise was nevertheless required for those rules that were considered relevant to the topic. In this context, the term "applicability" raised two questions that needed to be addressed: whether or not the rule applied, in the formal sense; and whether applicability of the rule could be transposed to situations of armed conflict or if this required the rule to be adapted. It was pointed out that such analysis seemed to be lacking with regard to a number of the proposed draft principles.

158. Also with regard to methodology, it was pointed out that the draft principles needed to differentiate between international and non-international armed conflicts since the rules applicable to the two categories of conflicts differed, as did the stakeholders involved.

159. Regarding the scope of the topic, while some members welcomed the broad approach suggested by the Special Rapporteur, others considered the report and the proposed draft principles to extend too far beyond the protection of the environment as such in also addressing the environment as a natural resource and as a human environment, bringing in a human rights perspective. Furthermore, while some members considered that the scope of the topic should be limited to the natural environment, some others supported a more comprehensive approach.

160. The need to use uniform terminology throughout the draft principles was also raised. This was particularly relevant with regard to the terms "environment" and "natural environment".

161. Concerning the outcome of the topic, while some members reiterated their support for draft principles, it was also suggested that a more prescriptive approach, such as draft articles, could be envisaged. Several members stressed the importance of ensuring that the terminology employed in the draft principles corresponded to the normative status intended for the topic. In this regard, references were made to the inconsistent use of the terms "shall", "should" and "are encouraged".

162. The detailed information on State practice and analysis of applicable rules contained in the report was welcomed by some members. Certain submissions were considered of particular interest in putting forward the viewpoints of the victims of environmental damage from armed conflict.

(b) *Draft principle I-1—Implementation and enforcement*

163. While several members found the content of draft principle I-1 to be pertinent to the topic, some other members pointed out that the draft principle was not substantiated by the materials contained in the report and that it was therefore difficult to properly appreciate it. Generally, members observed that the preventive measures envisaged in the draft principle needed to be further specified, as it was drafted in overly broad terms. It was also noted that the temporal scope of the draft principle was unclear. In this regard, some members were of the view that the draft principle was equally relevant to the post-conflict phase and the pre-conflict phase. The draft provision's relationship with the ensuing draft principles in Part One also required clarification, in particular whether the latter constituted different forms of application of the former. It was also suggested that the title be amended to better correspond to the content of the draft principle.

(c) *Draft principle I-3—Status of forces and status of mission agreements*

164. The relevance of draft principle I-3 for the topic was questioned by several members. In their view, status of forces and status of mission agreements did not concern the conduct of stationed forces, as envisaged in the

[1280] *Yearbook … 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101; see, in particular, the indicative list referred to in article 7, which appears in the annex to the articles on the effects of armed conflicts on treaties (*ibid.*, pp. 119).

proposed provision, and did not relate directly to armed conflict as such. It was suggested that the reference to such agreements be replaced with "special agreements" if the provision were to be retained. It was, however, pointed out that contemporary status of forces and status of mission agreements seemed to include provisions on environmental protection, and the measures proposed in the draft principle could therefore be contemplated. While acknowledging that status of forces and status of mission agreements did not address armed conflict, some other members nevertheless considered that the draft principle constituted an important preventive measure, which could address other potential environmental consequences, such as contamination of military bases. It was further stressed that the polluter-pays principle should be reflected in the draft principle. The view was also expressed that the last sentence of the draft principle, enumerating various measures, gave rise to confusion as to which temporal phase the draft provision belonged with.

(d) *Draft principle I-4—Peace operations*

165. Recognizing that peace operations increasingly seem to take into account environmental concerns, several members expressed support for addressing this issue in the context of the topic. They questioned, however, the placement of the draft principle in the pre-conflict phase, since the measures exemplified in the proposed provision seemed applicable not only during the preventive phase, but also during the operational phase (mitigation) and the post-conflict phase (remediation). The obligations should therefore either be reflected in each phase or placed in an overarching section dealing with general principles that were relevant for all temporal phases. It was also pointed out that peace operations could play an important role in post-conflict recovery and that the draft principle should therefore focus on restorative and remedial measures. In order to better define the scope of the draft principle, it was suggested that the term "peace operation" be defined for the purpose of the draft principle, or at least explained in the commentary. Furthermore, the language in the draft principle needed to be more permissive in order to better reflect the current status of the law—no corresponding obligation seemed yet to exist under international law. In this regard, some members observed that the report did not contain sufficient research into and analysis of the practice with regard to peace operations to substantiate the content of the proposed provision. It was further pointed out that the premise upon which a peacekeeping operation was based, in particular the non-use of force and consent of the parties, distinguished it from armed conflict. Including peacekeeping operations in the scope of the topic risked portraying them as engaging in armed conflict, endangering the viability and usefulness of such operations as a whole.

(e) *Draft principle III-1—Peace agreements*

166. Several members expressed support for draft principle III-1 and agreed that peace agreements should contain provisions concerning the reparation of environmental damage caused by armed conflict. It was nevertheless emphasized that post-conflict environmental protection management and the allocation of responsibilities for such management fell outside the scope of the topic. Pointing to what they saw as a *lacuna* in the draft principle, some members were of the view that peace agreements should also include provisions addressing questions relating to incrimination, allocation of responsibility for environmental damage, and compensation. It was stated that the facilitating role played by international and regional organizations concerning the inclusion of such provisions in peace agreements should also be reflected.

167. Some other members observed that the draft principle referred to armed conflict without any qualifier as to the nature of the conflict and without distinguishing between States and non-State actors. Such an approach was problematic, as the dynamics between the parties to a conflict differed significantly in international and non-international armed conflicts; in the latter case, a party to the conflict may simply vanish. Furthermore, providing non-State actors with obligations similar to those of States risked legitimizing a party to the conflict. In this regard, it was suggested that the material scope of the draft principle be limited to international armed conflicts, while noting, however, that this may require further study, as the report had mainly examined peace agreements in respect of non-international armed conflicts. The view was nevertheless also expressed that peace agreements between States were now rarely concluded and, if they were, they usually did not contain provisions on environmental protection. The scope should therefore be limited to non-international armed conflicts.

(f) *Draft principle III-2—Post-conflict environmental assessments and reviews*

168. The importance of post-conflict environmental assessments and reviews was generally recognized by the members of the Commission. It was noted that the draft principle did not reflect existing legal obligations under international law but proposed an important policy consideration. Questions were nevertheless raised concerning the temporal scope of paragraph 1 of the draft principle, both with regard to the point in time when such assessments and reviews were supposed to be carried out and to its placement in the post-conflict phase. Concerning the former, it was pointed out that former belligerents were unlikely to cooperate immediately after the cessation of hostilities, which left an important temporal gap to be filled. With regard to the latter, it was suggested that assessments and reviews were equally important during the armed conflict phase, especially when damage required immediate mitigation measures. Moreover, the view was expressed that the scope of paragraph 1 of the draft principle should be limited to States, as the need for cooperation with non-State actors could only be evaluated on a case-by-case basis. Concerning paragraph 2, it was observed that if the intention was only to conduct such assessments for the benefit of future operations, which in itself was questioned, the provision would be better placed in the preventive phase, or could be deleted all together since it was covered in draft principle I-4. It was further suggested that the draft principle should also reflect the need to protect personnel conducting environmental assessments and reviews.

169. It was further pointed out that an analysis was required on how and to what extent the environmental

rule upon which the draft principle was based, in order to properly evaluate its relevance and applicability in relation to armed conflict.

(g) *Draft principle III-3—Remnants of war, and draft principle III-4—Remnants of war at sea*

170. Several members considered that draft principles III-3 and III-4 were highly pertinent to the topic. Some members observed, however, that the link to protection of the environment must be further specified in the draft principles. This was particularly true with regard to draft principle III-3, which seemed to be justified on the basis of harm done to humans and property rather than to the environment. For similar reasons, it was pointed out that the reference to public health and the safety of seafarers in draft principle III-4 should be deleted.

171. Draft principle III-3 also required clarification with regard to who should have the primary responsibility for meeting the obligations contained therein. In this regard, some members expressed the view that such responsibility should remain with the State having effective jurisdiction and with relevant international organizations; it would be unrealistic to expect non-State actors involved in the armed conflict to carry out the measures envisaged in the draft principle. It was also suggested that a duty of notification, as contained in article 5 of the Convention relative to the Laying of Automatic Submarine Contact Mines, be incorporated into the draft principle.

172. Several references were made to the use of the term "without delay" in paragraph 1 of draft principle III-3, which seemed neither to reflect practice nor appear realistic. The removal of remnants of war would only be considered a priority after the cessation of hostilities if such removal was necessary to satisfy the immediate needs of the population. The point was also made that paragraph 2 of the same draft principle seemed to lay down unconditional obligations that went beyond State practice.

173. Another area requiring further examination concerned the types of remnants of war that the draft principles aimed to cover, the current wording seeming over-inclusive and under-inclusive at the same time. In this respect, while several members considered it important to take a broad, non-exhaustive approach, it was also observed that attempting to cover all remnants of war would require further study. It was also suggested that the type of information envisaged under paragraph 2 of draft principle III-4 be further specified, possibly in the commentary.

174. Some members stressed that the relationship between draft principles III-3 and III-4 needed further clarification. It was unclear, for example, if draft principle III-3 was of a generic character. Some suggestions were made that the two provisions could be merged. It was also observed that the draft principles did not contain corresponding obligations, and the question was raised as to why the obligation to remove remnants of war had been omitted from draft principle III-4. The view was further expressed that the question of allocation of responsibility for the removal of remnants of war at sea should be reflected in the draft principle.

(h) *Draft principle III-5—Access to and sharing of information*

175. While granting access to and sharing information was generally considered to be important for the purpose of the topic, some members were of the view that draft principle III-5 was drafted in excessively broad terms. The scope of the obligation needed to be both clarified and adjusted, in particular to take into account situations where States had valid reasons not to share information, for example owing to national security concerns. It was nevertheless also pointed out that, as the obligation was drafted with the caveat "in accordance with their obligations under international law", the proposed provision did not imply such extensive obligations. Some members observed that since granting access to and sharing information rested on the consent of the State, the language in the draft principle needed to be less prescriptive. It was also noted that granting access to and sharing information were two distinct obligations, and that it was not possible to address them in the same manner.

176. Several members observed that the temporal scope of the draft principle needed to be specified as it was unclear at what point in time information should be shared. Owing to the general nature of the draft principle, some members considered that it applied to all three phases and that it would be better placed in a part dealing with "general principles". However, other members stressed that the obligation to grant access to and share information could not apply to phase II (during armed conflict). The principle of granting access to and sharing information was based on rules applicable in peacetime and could not simply be transposed to situations of armed conflict. The point was also made, however, that, should the draft principle be applicable during the armed conflict phase, sufficient caveats could be employed to clarify the scope of the obligation so that it would not relate to matters of national security or defence. A suggestion was also made to specify that the draft principle related only to the post-conflict phase. Clarifications were sought as to which actors access to information should be granted and what type of information should be shared during each respective phase.

(i) *Draft principle IV-1—Rights of indigenous peoples*

177. Several members considered that issues pertaining to the rights of indigenous peoples were outside the scope of the current topic, and that the fact that indigenous peoples had a special relationship with their land and the living environment did not justify addressing the matter. In addition, the content of draft principle IV-1 was not relevant to the current topic; it simply did not deal with damage from armed conflicts as it relates to indigenous peoples. Instead, the matter had been tackled from a human rights perspective that failed to address the reasoning behind the need to touch upon the issue. Several other members acknowledged that the question had been analysed from a very narrow perspective in the report, which did not do the issue justice. While recognizing both this and the fact that the content of draft principle IV-1 did not properly address the issue at hand, they nevertheless considered it important to reflect the situation of indigenous peoples in the draft principles. They emphasized

that those peoples were particularly vulnerable to external interference and therefore needed special consideration with regard to the protection of their environment, including in relation to armed conflicts. In this regard, reference was made to pertinent provisions contained in the United Nations Declaration on the Rights of Indigenous Peoples[1281] and the American Declaration on the Rights of Indigenous Peoples.[1282] Instead of excluding the issue entirely, the draft principle should be redrafted to focus on the need to protect the lands and the environment of indigenous peoples. It was also suggested that indigenous peoples are particularly affected by, and have an important role to play in, post-conflict remediation efforts. The draft principle should therefore focus on this phase and relate more specifically to obligations of States in dealing with the environmental consequences of armed conflict. The view was also expressed that the question could perhaps be dealt with in the context of draft principle I-(x) on protected zones, which the Commission had taken note of at its previous session.[1283] It was suggested that the draft principle on the rights of indigenous peoples was relevant in all three temporal phases and should therefore be placed in a part containing "general principles".

(j) *Future programme of work*

178. Some members reiterated the importance they attached to the topic and expressed their strong desire to see it continue in the next quinquennium, noting that the Special Rapporteur was about to end her term with the Commission. Regarding specific issues to be considered in the future, several members stressed the importance of addressing questions concerning responsibility, liability and compensation in the context of the draft principles. The point was also made, however, that an attempt to include these issues in the draft principles might render the outcome much more prescriptive. Some members agreed with the Special Rapporteur's view that it might be pertinent to examine the question of occupation. In addition, some members observed that questions on the responsibility of non-State actors and organized armed groups and non-international armed conflicts might also be of interest. In this regard, it was nevertheless observed that the current draft principles already seemed to include non-international armed conflicts within their scope, which therefore raised the question of whether, pending such future consideration, this would affect the work already undertaken. It was further suggested that a draft principle should be included acknowledging that States should carefully test new weapons and prepare adequate military manuals in anticipation of future armed conflicts. Furthermore, the view was expressed that it might be useful to examine how the environment was factored into the activities of various financial and investment institutions, such as the International Centre for Settlement of Investment Disputes, the Multilateral Investment Guarantee Agency and the International Finance Corporation, and in particular whether insurance against damage to the environment was available.

179. Some members agreed with the Special Rapporteur that it would be valuable for the Commission to continue consultations with other entities, such as the ICRC, UNESCO and UNEP, as well as with regional organizations. They also agreed that it would be useful if States would continue to provide examples of legislation and relevant case law.

3. Concluding remarks of the Special Rapporteur

180. In the light of the comments made during the plenary debate concerning the methodology of the report and the topic at large, the Special Rapporteur considered it useful to clarify that the temporal division of the topic had been employed to facilitate research and analysis on the topic, given its extensive nature. She agreed that maintaining the arrangement of draft principles under temporal headings, which stemmed from work undertaken in the Drafting Committee and was reflected in the outcome of that work, posed substantive problems since, as had been noted in the debate, several of the draft principles were relevant to more than one phase. Should the Commission decide to reflect the temporal division in the draft principles, it would be appropriate to insert a separate part entitled "Principles of general application" at the very beginning. This part would replace the tentatively entitled "Part Four—[Additional principles]". She was convinced that the concerns expressed over the temporal boundaries could be addressed in the Drafting Committee.

181. With regard to the comments on the adequacy of some of the research contained in the report and also its relevance to the topic, the Special Rapporteur noted that the protection of the environment in relation to armed conflicts was a new area of legal development. It was therefore important to show how environmental concerns in that context were increasingly reflected in different legal fields, sometimes in ways that could be perceived as only indirectly relevant to the topic. This was particularly evident in the case law concerning environmental damage, which often deviated and seemed to address property or human rights only, as this constituted a more viable legal argument. Another area of the report that had generated similar criticism was the section on investment agreements. Referring to the Commission's articles on the effects of armed conflicts on treaties, the Special Rapporteur recalled that investment agreements are part of a group of treaties[1284] that have an implication of continued operation during armed conflict. They therefore served to illustrate that environmental protection is incorporated into treaties that may continue to operate during armed conflict. The Special Rapporteur maintained that these issues were both important and relevant in the development of the topic. She further stressed that the topic was not limited to the protection of the environment during armed conflict; its entire rationale was also to address other areas of international law and not remain limited to the law of armed conflict. The title of the topic clearly underlined this point. However, the Special Rapporteur acknowledged

[1281] General Assembly resolution 61/295 of 13 September 2007, annex.

[1282] Organization of American States, resolution AG/RES. 2888 (XLVI-O/16), of 15 June 2016.

[1283] *Yearbook … 2015*, vol. II (Part Two), pp. 64–65, para. 134.

[1284] Treaties of friendship, commerce and navigation and agreements concerning private rights (see the indicative list of treaties referred to in article 7, which appears in the annex to the draft articles (*Yearbook … 2011*, vol. II (Part Two), p. 119, at pp. 123–126)).

the criticism that the connection to the protection of the environment could be enhanced in several of the draft principles.

182. In response to comments that the section on future work was insufficiently developed, the Special Rapporteur noted that she had found it more appropriate simply to highlight certain issues that the Commission might wish to consider, as it would be for the next Special Rapporteur to decide on how to proceed.

183. The Special Rapporteur also addressed some of the comments concerning the draft principles. With regard to draft principle I-1, she recognized that it had been drafted in general terms, without specifying the various measures envisaged. This could be addressed by exemplifying some of the measures intended, either within the draft principle or in the commentary.

184. In response to the comments questioning the relevance of status of forces and status of mission agreements, mentioned in draft principle I-3, the Special Rapporteur reiterated that the topic was not limited to addressing the second phase—during armed conflict—and observed that such agreements might address issues that were vital for the protection of the environment. In this regard, marking, reconstruction and preventive measures for dealing with toxic substances were mentioned as relevant examples. Turning to draft principle I-4, the Special Rapporteur observed that the idea of addressing peace operations in the draft principles seemed to have garnered general support. However, in relation to the concern expressed that including peacekeeping missions in the scope of the topic might risk portraying their engagement as armed conflict, she once again emphasized that the draft principles were not confined to situations of armed conflict but also covered the pre- and post-conflict phases. She also recalled that international humanitarian law applied to such missions.

185. With regard to draft principles III-3 and III-4, on remnants of war, the Special Rapporteur noted that comments on them had related to the exhaustiveness of the list of remnants of war referred to therein, allocation of responsibility for their removal, the temporal aspect of the draft provisions and the political realities with regard to their implementation. Concerning the types of remnants referred to in draft principle III-3, she observed that the draft principle reflected the law of armed conflict as it currently stood. Nevertheless, she welcomed suggestions to revisit the issue to ensure that other toxic and hazardous remnants were also covered. The Special Rapporteur also clarified that the allocation of responsibility for removing remnants of war was regulated by the law of armed conflict and had therefore not been addressed in the draft principles. Furthermore, the relevant legal provisions on this matter denoted that such responsibility was not limited to States but could be interpreted to include other actors involved in a conflict as well. Regarding the temporal aspect of the draft principles, the Special Rapporteur recalled that they had been placed in the post-conflict phase and, as such, were intended to apply to that phase. Referring to the concerns raised that the words "without delay" included in draft principle III-3 would impose an unreasonable obligation on States, she noted that the expression was used in article 10 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Convention on Certain Conventional Weapons).

186. Referring to the comments on the applicable phase of draft principle III-5, the Special Rapporteur was of the view that if the temporal headings were retained in the draft principles, this provision was best suited for post-conflict situations. She also observed that exceptions to the principle of granting access to and sharing of information for reasons of national security and defence could be reflected in the proposed provision, as had been suggested by some members. She noted, however, that while such exceptions were provided for in several existing legal instruments, this did not relieve parties from the obligation to cooperate in good faith.

187. The Special Rapporteur observed that draft principle IV-1, on rights of indigenous peoples, had generated extensive comments, which had revealed divergent views among members on whether or not to address this issue in the context of the current topic. The Special Rapporteur, who remained convinced that the issue was highly pertinent to the topic, referred to various instruments where the connection between indigenous peoples and their environment had been emphasized and to instruments that demonstrated that this connection was particularly relevant in the context of armed conflict.[1285] She acknowledged, however, that this connection should be enhanced in the draft principle, which should not only focus clearly on the protection of the environment of indigenous peoples, but also provide a direct link to armed conflict situations.

C. Text of the draft principles on protection of the environment in relation to armed conflicts provisionally adopted so far by the Commission

1. Text of the draft principles

188. The text of the draft principles provisionally adopted so far by the Commission is reproduced below.

Draft principle 1. Scope

The present draft principles apply to the protection of the environment[*] before, during or after an armed conflict.

Draft principle 2. Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.

[…]

[*] Whether the term "environment" or "natural environment" is preferable for all or some of these draft principles will be revisited at a later stage.

[1285] United Nations Declaration on the Rights of Indigenous Peoples (see footnote 1281 above) and the ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries.

PART ONE

GENERAL PRINCIPLES

[…]

Draft principle 5 [I-(x)].* ***Designation of protected zones***

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

[…]

[…]

PART TWO

PRINCIPLES APPLICABLE DURING ARMED CONFLICT

Draft principle 9 [II-1]. General protection of the natural environment during armed conflict

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.

3. No part of the natural environment may be attacked, unless it has become a military objective.

Draft principle 10 [II-2]. Application of the law of armed conflict to the natural environment

The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.

Draft principle 11 [II-3]. Environmental considerations

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

Draft principle 12 [II-4]. Prohibition of reprisals

Attacks against the natural environment by way of reprisals are prohibited.

Draft principle 13 [II-5]. Protected zones

An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

2. TEXT OF THE DRAFT PRINCIPLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-EIGHTH SESSION

189. The text of the draft principles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session is reproduced below.

PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

Introduction

(1) Structurally, the set of draft principles is divided into three parts following the initial part, entitled "Introduction", which contains draft principles on the scope and purpose of the draft principles. Part One concerns guidance on the protection of the environment *before* the outbreak of an armed conflict but also contains draft principles of a more general nature that are of relevance for all three temporal phases: before, during and after an armed conflict. Additional draft principles will be added to this part at a later stage. Part Two pertains to the protection of the environment *during* armed conflict, and Part Three pertains to the protection of the environment *after* an armed conflict.

(2) The provisions have been cast as draft "principles" based on the understanding that the final form will be subject to consideration at a later stage. The intersection between the law relating to the environment and the law of armed conflict is inherent to the topic. It is for this reason that the principles are cast normatively at a general level of abstraction.[1286]

(3) The Commission has yet to formulate a preamble to accompany the draft principles. It is understood that a preamble, formulated in the usual manner, will be prepared at the appropriate time.

(4) In the preliminary report, the Special Rapporteur tentatively suggested definitions of the terms "armed conflict" and "environment" to be included in a "use of terms" provision, should the Commission decide to include such definitions.[1287] The Special Rapporteur also made it clear that she was not convinced of the need to adopt such a provision, particularly not at an early stage of the work. However, putting them forward served the purpose of illustrating some questions that might arise when defining these terms, and allowed the opportunity to take members' views on the matter into consideration.[1288] In her second report, the Special Rapporteur included the "use of terms" provision in the proposed draft principles,[1289] but requested that this particular provision not be sent to the Drafting Committee.[1290] Some members, including the Special Rapporteur, remained reluctant to include definitions, whereas others took the opposite view. In the light of this, it was considered premature to delete it and the Special Rapporteur retained the proposal in order to evaluate the need for the provision in the light of subsequent discussions.

Draft principle 1. Scope

The present draft principles apply to the protection of the environment* before, during or after an armed conflict.

** Draft principles provisionally adopted by the Drafting Committee at the sixty-seventh session, of which the Commission took note at the same session, are indicated in square brackets.

* Whether the term "environment" or "natural environment" is preferable for all or some of these draft principles will be revisited at a later stage.

[1286] The Commission has previously chosen to formulate the outcome of its work as draft principles; see, for example, the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (*Yearbook … 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67).

[1287] A/CN.4/674 (see footnote 1268 above), paras. 78 and 86.

[1288] Introductory statement by the Special Rapporteur, 18 July 2014, at the 3227th meeting of the Commission (not reflected in the summary record of the meeting).

[1289] A/CN.4/685 (see footnote 1269 above), annex I.

[1290] Introductory statement by the Special Rapporteur, 6 July 2015, at the 3264th meeting of the Commission (partly reflected in the summary record of the meeting (*Yearbook … 2015*, vol. I, p. 147)).

Commentary

(1) This provision defines the scope of the draft principles. It provides that they cover three temporal phases: before, during and after armed conflict. It was viewed as important to signal quite early that the scope of the draft principles relates to these phases. The disjunctive "or" seeks to underline that not all draft principles would be applicable during all phases. However, it is worth emphasizing that there is, at times, a certain degree of overlap between these three phases. Furthermore, the formulation builds on discussions within the Commission and in the Sixth Committee of the General Assembly.[1291]

(2) The division of the principles into the temporal phases described above (albeit without strict dividing lines) sets out the *ratione temporis* of the draft principles. It was considered that addressing the topic from a temporal perspective rather than from the perspective of various areas of international law, such as international environmental law, the law of armed conflict and international human rights law, would make the topic more manageable and easier to delineate. The temporal phases would address legal measures taken to protect the environment before, during and after an armed conflict. Such an approach allowed the Commission to identify concrete legal issues relating to the topic that arise at the different stages of an armed conflict, which facilitated the development of the draft principles.[1292]

(3) Regarding the *ratione materiae* of the draft principles, reference is made to the term "protection of the environment" as it relates to the term "armed conflicts". No distinction is made between international armed conflicts and non-international armed conflicts.

(4) The asterisk attached to the term "environment" indicates that the Commission has not yet decided whether a definition of this term should be included in the text of the draft principles and, if so, whether the term to be defined should be the "natural environment" or simply the "environment".[1293]

Draft principle 2. Purpose

The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.

Commentary

(1) This provision outlines the fundamental purpose of the draft principles. It makes it clear that the draft principles aim to enhance the protection of the environment in relation to armed conflict, including through preventive measures (which aim to minimize damage to the environment during armed conflict) and also through remedial measures (which aim to restore the environment after damage has already been caused as a result of armed conflict). It should be noted that the purpose of the provision is reflected in the word "enhancing", which in this case should not be interpreted as an effort to progressively develop the law.

(2) The provision states the purpose of the draft principles, which would be subject to further elaboration in the ensuing principles. The reference to "including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures" is meant to signal the general kinds of measures that would be required to offer the necessary protection.

(3) Similar to the provision on scope, the present provision covers all three temporal phases. While it has been recognized both within the Commission[1294] and within the Sixth Committee of the General Assembly[1295] that the three phases are closely connected,[1296] the reference to "preventive measures for minimizing damage" relates primarily to the situation before and during armed conflict, and the reference to "remedial measures" in turn principally concerns the post-conflict phase. It should be noted that a State may take remedial measures to restore the environment even before the conflict has ended.

(4) The term "remedial measures" was preferred to the term "restorative measures" as it was viewed as clearer and broader in scope, encompassing any measure of remediation that may be taken to restore the environment. This might include, *inter alia*, loss or damage by impairment to the environment, costs of reasonable measures of reinstatement, as well as reasonable costs of clean-up associated with the costs of reasonable response measures.

Part One

GENERAL PRINCIPLES

Draft principle 5 [I-(x)]. Designation of protected zones

States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

Commentary

(1) Draft principle 5 [I-(x)] is entitled "Designation of protected zones" and provides that States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.

[1291] The topic was included in the long-term programme of work of the Commission in 2011 and moved to the current programme of work in 2013 (*Yearbook … 2011*, vol. II (Part Two), p. 175, para. 365, and *Yearbook … 2013*, vol. II (Part Two), p. 72, para. 131).

[1292] *Yearbook … 2013*, vol. II (Part Two), p. 72, para. 135; see also *Yearbook … 2014*, vol. II (Part Two), pp. 154 *et seq.*, paras. 192–213.

[1293] The tentative proposal on the use of terms was referred to the Drafting Committee at the request of the Special Rapporteur on the understanding that the provision was referred for the purpose of facilitating discussions.

[1294] *Yearbook … 2014*, vol. II (Part Two), pp. 154–155, para. 193.

[1295] Norway (on behalf of the Nordic countries) (A/C.6/69/SR.25, para. 133), Portugal (A/C.6/69/SR.26, para. 6), Singapore (*ibid.*, para. 66), New Zealand (A/C.6/69/SR.27, para. 3) and Indonesia (*ibid.*, para. 67).

[1296] For example, remedial measures might be required during an occupation.

The term "protected zones" was employed as opposed to "demilitarized zones", as the latter term is amenable to different understandings. Part One ("General principles"), where this provision is placed, deals with the pre-conflict stage, when peace is prevailing, but also contain principles of a more general nature that are relevant to all three temporal phases. Draft principle 5 [I-(x)] therefore does not exclude instances in which such areas could be designated either during or soon after an armed conflict. It was recognized that there would be certain draft principles that cut across and straddle the various phases, and draft principle 5 [I-(x)] serves as an example of such a principle. In addition, draft principle 5 [I-(x)] has a corresponding draft principle (draft principle 13 [II-5]) which is placed in Part Two ("Principles applicable during armed conflict").

(2) A State may already be taking the necessary measures to protect the environment in general. Such measures may include, in particular, preventive measures in the event that an armed conflict might occur. It is not uncommon that physical areas are assigned a special legal status as a means to protect and preserve a particular area. This can be done through international agreements or through national legislation. In some instances such areas are not only protected in peacetime, but are also immune from attack during an armed conflict.[1297] As a rule, this is the case with demilitarized and neutralized zones. It should be noted that the term "demilitarized zones" has a special meaning in the context of the law of armed conflict. Demilitarized zones are established by the parties to a conflict and imply that the parties are prohibited from extending their military operations to that zone if such an extension is contrary to the terms of their agreement.[1298] Demilitarized zones can also be established and implemented in peacetime.[1299] Such zones can cover various degrees of demilitarization, ranging from areas that are fully demilitarized to ones which are partially demilitarized, such as nuclear-weapon-free zones.

(3) When designating protected zones under this draft principle, particular weight should be given to the protection of areas of major environmental importance that are susceptible to the adverse consequences of hostilities.[1300] Granting special protection to areas of major ecological importance was suggested at the time of the drafting of the Protocols additional to the 1949 Geneva Conventions.[1301] While the proposal was not adopted, it should be recognized that it was formulated in the infancy of international environmental law. Other types of zones are also relevant in this context, and will be discussed below.

(4) The areas referred to in this draft principle may be designated by agreement or otherwise. The reference to "by agreement or otherwise" is intended to introduce some flexibility. The types of situations foreseen may include, *inter alia*, an agreement concluded verbally or in writing, reciprocal and concordant declarations, as well as those created through a unilateral declaration or designation through an international organization. It should be noted that the reference to the word "State" does not preclude the possibility of agreements being concluded with non-State actors. The area declared has to be of "major environmental and cultural importance". The formulation leaves open the precise meaning of this requirement on purpose, to allow room for interpretation. While the designation of protected zones could take place at any time, it should preferably be before or at least at the outset of an armed conflict.

(5) It goes without saying that under international law, an agreement cannot bind a third party without its consent.[1302] Thus two States cannot designate a protected area in a third State. The fact that States cannot regulate areas outside their sovereignty or mandate of jurisdiction in a manner that is binding on third States, whether through agreements or otherwise, was also outlined in the second report of the Special Rapporteur.[1303]

(6) Different views were initially expressed as to whether or not the word "cultural" should be included. Ultimately, the Commission opted for the inclusion of the term. It was noted that it is sometimes difficult to draw a clear line between areas which are of environmental importance and areas which are of cultural importance. This is also recognized in the Convention for the Protection of the World Cultural and Natural Heritage. The fact that the heritage sites under this Convention are selected on the basis of a set of ten criteria, including both cultural and natural (without differentiating between them) illustrates this point.[1304]

[1297] See the second report of the Special Rapporteur (A/CN.4/685) (footnote 1269 above), para. 210.

[1298] See the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 60. See also J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge, ICRC and Cambridge University Press, 2005), p. 120. The ICRC study on customary law considers that this constitutes a rule under customary international law and is applicable in both international and non-international armed conflicts.

[1299] See, for example, the Antarctic Treaty, 1959, art. I. See also, for example, the definition found in M. Björkholm and A. Rosas, *Ålandsöarnas demilitarisering och neutralisering* (Åbo, Åbo Academi University Press, 1990). The Åland Islands are both demilitarized and neutralized. Björkholm and Rosas list as further examples of demilitarized and neutralized areas Spitzbergen, Antarctica and the Strait of Magellan (p. 17). See further L. Hannikainen, "The continued validity of the demilitarised and neutralised status of the Åland Islands", *Heidelberg Journal of International Law,* vol. 54 (1994), p. 614, at p. 616.

[1300] See the second report of the Special Rapporteur (A/CN.4/685) (footnote 1269 above), para. 225. See also C. Droege and M.-L Tougas, "The protection of the natural environment in armed conflict—existing rules and need for further legal protection", *Nordic Journal of International Law*, vol. 82 (2013), p. 21, at pp. 43 *et seq*.

[1301] The working group of Committee III of the Geneva Diplomatic Conference submitted a proposal for a draft article 48 *ter*, which provided that "[p]ublicly recognized nature reserves with adequate markings and boundaries declared as such to the adversary shall be protected and respected except when such reserves are used specifically for military purposes" (C. Pilloud and J. Pictet, "Article 55—Protection of the natural environment", *in* Y. Sandoz, C. Swinarski and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, ICRC and Martinus Nijhoff, 1987), p. 661, at p. 664, paras. 2138–2139).

[1302] As recognized by the Permanent Court of International Justice in the case concerning the *Factory at Chorzów, P.C.I.J., Series A, No. 17 (1928),* p. 45, and reflected in article 34 of the 1969 Vienna Convention.

[1303] A/CN.4/685 (see footnote 1269 above), para. 218.

[1304] See UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention* (8 July 2015), WHC.15/01, para. 77. At present, 197 sites representing natural heritage across the world are listed on the World Heritage List. A number of these also feature on the List of World Heritage in Danger in accordance with article 11, para. 4, of the Convention for the Protection of the World Cultural and Natural Heritage.

(7) It should be recalled that prior to an armed conflict, States parties to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 1954 (1954 Hague Convention) and its Protocols, are under the obligation to establish inventories of cultural property items that they wish to enjoy protection in the case of an armed conflict, in accordance with article 11, paragraph 1, of the Second Protocol to the Convention, of 1999. In peacetime, State parties are required to take other measures that they find appropriate to protect their cultural property from anticipated adverse impacts of armed conflicts, in accordance with article 3 of the Convention.

(8) The purpose of the present draft principle is not to affect the regime of the 1954 Hague Convention, which is separate in its scope and purpose. The Commission underlines that the 1954 Hague Convention, including its additional protocols, are the special regime that governs the protection of cultural property both in times of peace and during armed conflict. It is not the intention of the present draft principle to replicate that regime. The idea here is to protect areas of major "environmental importance". The reference to the term "cultural" is intended to imply the existence of a close linkage to the environment. In this context, it should be noted, though, that the draft principle does not extend to cultural objects *per se*. The term would however include, for example, ancestral lands of indigenous peoples, who depend on the environment for their sustenance and livelihood.

(9) The designation of the areas foreseen by this draft principle can be related to the rights of indigenous peoples, particularly if the protected area also serves as a sacred area which warrants special protection. In some cases, the protected area may also serve to conserve the particular culture, knowledge and way of life of the indigenous populations living inside the area concerned. The importance of preserving indigenous culture and knowledge has now been formally recognized in international law under the Convention on Biological Diversity. Article 8 (*j*) states that each Contracting Party shall, as far as possible and as appropriate: "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices". In addition, the United Nations Declaration on the Rights of Indigenous Peoples,[1305] although not a binding instrument, refers to the right to maintain, access and protect religious and cultural sites.

(10) The protection of the natural environment as such and the protection of sites of cultural and natural importance sometimes correspond or overlap. The term "cultural importance", which is also used in draft principle 13 [II-5], builds on the recognition of the close connection between the natural environment, cultural objects and characteristics in the landscape in environmental protection instruments such as the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (adopted under the Council of Europe).[1306] Article 2, paragraph 10, defines the term "environment" for the purpose of the Convention to include: "natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of cultural heritage; and the characteristic aspects of the landscape". In addition, article 1, paragraph 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes stipulates that "effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors".

(11) Moreover, the Convention on Biological Diversity speaks to the cultural value of biodiversity. The preamble to the Convention reaffirms that the parties are "[c]onscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components". Similarly, the first paragraph of annex I to the Convention highlights the importance of ensuring protection for ecosystems and habitats "containing high diversity, large numbers of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance; or, which are representative, unique or associated with key evolutionary or other biological processes".

(12) In addition to these binding instruments, a number of non-binding instruments use a lens of cultural importance and value to define protected areas. For instance, the draft convention on the prohibition of hostile military activities in internationally protected areas (prepared by the International Union for Conservation of Nature World Commission on Environmental Law and the International Council of Environmental Law) defines the term "protected areas" as follows: "natural or cultural area of outstanding international significance from the points of view of ecology, history, art, science, ethnology, anthropology, or natural beauty, which may include, *inter alia*, areas designated under any international agreement or intergovernmental programme which meet these criteria".[1307]

(13) A few examples of domestic legislation referring to the protection of both cultural and environmental areas can also be mentioned in this context. For example, the Japanese Law for the Protection of Cultural Property of 30 May 1950 provides for animals and plants which have a high scientific value to be listed as "protected cultural property".[1308] The National Parks and Wildlife Act of 1974

[1305] General Assembly resolution 61/295, annex, art. 12.

[1306] For more information on the applicability of multilateral environmental agreements in connection with areas of particular environmental interest, see B. Sjöstedt, *Protecting the Environment in Relation to Armed Conflict: The Role of Multilateral Environmental Agreements* (doctoral dissertation, Lund University, 2016).

[1307] International Union for Conservation of Nature, draft convention on the prohibition of hostile military activities in internationally protected areas (1996), art. 1.

[1308] Japan, Law for the Protection of Cultural Property, No. 214 (30 May 1950), available from https://en.unesco.org/cultnatlaws.

of New South Wales, Australia, may apply to any area of natural, scientific or cultural significance.[1309] Finally, the Italian Protected Areas Act of 6 December 1991 defines "nature parks" as areas of natural and environmental value constituting homogeneous systems characterized by their natural components, their landscape and aesthetic values and the cultural tradition of the local populations.[1310]

Part Two

PRINCIPLES APPLICABLE DURING ARMED CONFLICT

Draft principle 9 [II-1]. General protection of the natural environment during armed conflict

1. The natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.

2. Care shall be taken to protect the natural environment against widespread, long-term and severe damage.

3. No part of the natural environment may be attacked, unless it has become a military objective.

Commentary

(1) Draft principle 9 [II-1] comprises three paragraphs which broadly provide for the protection of the natural environment during armed conflict. It reflects the obligation to respect and protect the natural environment, the duty of care, and the prohibition on attacks against any part of the environment, unless it has become a military objective.

(2) Paragraph 1 sets out the general position that in relation to armed conflict, the natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict. It is recalled that the Commission has not yet decided whether a definition of the term "environment" should be included in the text of the draft principles, and, if so, whether the term to be defined should be the "natural environment" or simply the "environment". It should be noted that Part Two, where draft principle 9 [II-1] is placed, addresses situations during armed conflict, and that treaties on the law of armed conflict often refer to the "natural environment" as distinct from the "environment".[1311]

(3) The words "respected" and "protected" were considered fitting for use in this draft principle as they have been used in several international environmental law and international human rights law instruments to date.[1312] The International Court of Justice, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons,* held that "[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principl[e] of necessity" and that States have a duty to "take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives".[1313]

(4) As far as the use of the term "law of armed conflict" is concerned, it should be emphasized that traditionally there was a distinction between the terms "law of armed conflict" and "international humanitarian law".[1314] International humanitarian law could be viewed narrowly as only referring to that part of the law of armed conflict which aims at protecting victims of armed conflict; whereas the law of armed conflict can be seen as more of an umbrella term covering the protection of victims of armed conflict as well as regulating the means and methods of war.[1315] The terms are increasingly seen as synonyms in international law.[1316] However, the term "law of armed conflict" was preferred for its broader meaning and to ensure consistency with the Commission's previous work on the draft articles on effects of armed conflict on treaties, in which context it was pointed out that the law of armed conflict also clearly includes the law of occupation and the law of neutrality.[1317] The relationship between the present topic and the topic of the effects of armed conflict on treaties should be emphasized.

(5) As far as the term "applicable international law" is concerned, it must be noted that the law of armed conflict is *lex specialis* during times of armed conflict, but that other rules of international law providing environmental protection remain relevant.[1318] Paragraph 1 of draft prin-

---

[1309] New South Wales, Australia, *National Parks and Wildlife Act 1974* (Act 80 of 1974), available from www.austlii.edu.au/au/legis/nsw/consol_act/npawa1974247/.

[1310] Italy, Act No. 394 laying down the legal framework for protected areas (6 December 1991), available from http://faolex.fao.org.

[1311] See the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), arts. 35 and 55. The ICRC commentary on article 55 of Protocol I additional to the Geneva Conventions advocates that the "natural environment" should be understood in a wide sense as covering the biological environment in which a population is living. See Pilloud and Pictet, "Article 55—Protection of the natural environment" (footnote 1301 above), p. 662, para. 2126: the "natural environment" "does not consist merely of the objects indispensable to survival … but also includes forests and other vegetation … as well as fauna, flora and other biological or climatic elements".

[1312] A considerable number of instruments on the law of armed conflict, environmental law and human rights law contain the terms "respect" and "protect". Of most relevance is the World Charter for Nature (General Assembly resolution 37/7 of 28 October 1982, annex, in particular the preamble and para. 1 of the general principles) and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), especially article 48, which provides that civilian objects shall be respected and protected. See also, for example, the International Covenant on Civil and Political Rights, art. 2; Protocol I to the 1949 Geneva Conventions, art. 55; and the Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I: Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigenda), resolution 1, annex I.

[1313] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 242, para. 30.

[1314] For a description of the semantics, see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* 2nd ed. (Cambridge, Cambridge University Press, 2010), paras. 35–37 and 41–43.

[1315] See, for example, R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford, Hart Publishing, 2008), pp. 16–17.

[1316] *Ibid*.

[1317] *Yearbook … 2011*, vol. II (Part Two), pp. 110–111, commentary to article 2.

[1318] See *Legality of the Threat or Use of Nuclear Weapons* (footnote 1313 above), pp. 240–242, paras. 25 and 27–30.

ciple 9 [II-1] is therefore relevant during all three phases (before, during and after armed conflict) to the extent that the law of armed conflict applies. This paragraph highlights the fact that the draft principles are intended to build on existing references to the protection of the environment in the law of armed conflict, together with other rules of international law, in order to enhance the protection of the environment in relation to armed conflict overall.

(6) Paragraph 2 is inspired by article 55 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides the rule that care shall be taken to protect the environment against widespread, long term and severe damage in international armed conflicts.[1319] The term "care shall be taken" should be interpreted as indicating that there is a duty on the parties to an armed conflict to be vigilant of the potential impact that military activities can have on the natural environment.[1320]

(7) Similar to article 55, draft principle 9 [II-1] also adopts the use of the word "and", which indicates a triple cumulative standard. However, draft principle 9 [II-1] differs from article 55 as regards applicability and generality. First, draft principle 9 [II-1] does not make a distinction between international and non-international armed conflicts, with the understanding that the draft principles are intended to apply to all armed conflicts.[1321] This includes international armed conflicts, understood in the traditional sense of an armed conflict fought between two or more States, as well as armed conflicts in which peoples are fighting against colonial domination, alien occupation and against racist régimes in the exercise of their right to self-determination; as well as non-international armed conflicts, which are fought either between a State and organized armed group(s) or between organized armed groups within the territory of a State (thus without the involvement of a State).[1322]

(8) The terms "widespread", "long-term" and "severe" are not defined in the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). The same terms are used in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.[1323] However, it must be kept in mind that this Convention does not contain the triple cumulative requirement stipulated in Protocol I, as it uses the word "or" instead of "and", and also that the context of this Convention is far narrower than that of Protocol I.

(9) Second, draft principle 9 [II-1] differs from article 55 of Protocol I in that it is of a more general nature. Unlike article 55, draft principle 9 [II-1] does not explicitly prohibit the use of methods or means of warfare which are intended or may be expected to cause damage to the natural environment and thereby prejudice the health or survival of the population. At the time of drafting, concerns were raised that this exclusion may weaken the text of the draft principles. However, the general nature of the draft principles needs to be stressed. The draft principles do not aim to reformulate rules and principles which already exist and are recognized by the law of armed conflict. In addition, paragraph 2 should be read together with draft principle 10 [II-2], which deals with the application of principles and rules of the law of armed conflict to the natural environment with the aim of providing environmental protection.

(10) It must also be stressed here that article 36 of Protocol I requires States to review new weapons and means and methods of warfare to ensure that they do not contravene existing rules of international law, and is applicable to all weapons.[1324] This requirement could be addressed in connection with a forthcoming draft principle.

(11) Paragraph 3 of draft principle 9 [II-1] seeks to treat the natural environment in the same way as a civilian object during armed conflict. This paragraph is based on the fundamental rule that a distinction must be made between military objectives and civilian objects.[1325]

[1319] Article 55 (Protection of the natural environment) of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) reads:

"1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

"2. Attacks against the natural environment by way of reprisals are prohibited."

[1320] Pilloud and Pictet, "Article 55—Protection of the natural environment" (see footnote 1301 above), p. 663, para. 2133. See also K. Hulme, "Taking care to protect the environment against damage: a meaningless obligation?", *International Review of the Red Cross*, vol. 92, No. 879 (September 2010), p. 675.

[1321] See preliminary report on the protection of the environment in relation to armed conflicts (A/CN.4/674) (footnote 1268 above), paras. 69–78.

[1322] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; Geneva Convention relative to the Treatment of Prisoners of War, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146; articles 2 and 3 common to these four Conventions; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 1; and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), art. 1.

[1323] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, art. I. In relation to article I, the terms "widespread", "long-term" and "severe" are understood as follows: "'widespread': encompassing an area on the scale of several hundred square kilometers"; "'long-lasting': lasting for a period of months, or approximately a season"; "'severe': involving serious or significant disruption or harm to human life, natural and economic resources or other assets" (*Report of the Conference of the Committee on Disarmament, Official Records of the General Assembly, Thirty-first Session, Supplement No. 27* (A/31/27), vol. I, p. 91).

[1324] See, for example, K. Lawand, "Reviewing the legality of new weapons, means and methods of warfare", *International Review of the Red Cross*, vol. 88, No. 864 (December 2006), p. 925; J. McClelland, "The review of weapons in accordance with Article 36 of Additional Protocol I", *ibid.*, vol. 85, No. 850 (June 2003), p. 397; UNEP, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (2009), p. 16.

[1325] See, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (footnote 1298 above), pp. 25–29 and 143.

(12) Paragraph 3 of draft principle 9 [II-1] can be linked to article 52, paragraph 2, of Protocol I, which defines the term "military objective" as:

> those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[1326]

The term "civilian object" is defined as "all objects which are not military objectives".[1327] In terms of the law of armed conflict, attacks may only be directed against military objectives, and not civilian objects.[1328] There are several binding and non-binding instruments which indicate that this rule is applicable to the natural environment.[1329]

(13) Paragraph 3 is, however, temporally qualified with the words "has become", which emphasizes that this rule is not absolute: the environment may become a military objective in certain instances, and could thus be lawfully targeted.[1330]

(14) Paragraph 3 is based on the first paragraph of rule 43 of the ICRC study on customary international law.[1331] However, the other parts of rule 43 were not included in its current formulation, which raised some concerns. In this regard, it is once again useful to reiterate that the draft principles are general in nature and that they do not aim to reformulate rules and principles already recognized by the law of armed conflict. Accordingly, both paragraph 2 and paragraph 3 must be read together with draft principle 10 [II-2], which specifically references the application of the law of armed conflict rules and principles of distinction, proportionality, military necessity and precautions in attack.

(15) It can be seen that draft principle 9 [II-1] tries to strike a balance in creating guiding principles for the protection of the environment in relation to armed conflict without reformulating rules and principles already recognized by the law of armed conflict.

Draft principle 10 [II-2]. Application of the law of armed conflict to the natural environment

The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the natural environment, with a view to its protection.

Commentary

(1) Draft principle 10 [II-2] is entitled "Application of the law of armed conflict to the natural environment" and deals with the application of principles and rules of the law of armed conflict to the natural environment with a view to its protection. Draft principle 10 [II-2] is placed in Part Two of the draft principles (principles applicable *during* armed conflict), illustrating that it is intended to apply during armed conflict. The overall aim of the draft principle is to strengthen the protection of the environment in relation to armed conflict, and not to reaffirm the law of armed conflict.

(2) The words "law of armed conflict" were chosen instead of "international humanitarian law" for the same reasons explained in the commentary to draft principle 9 [II-1]. The use of this term also highlights the fact that draft principle 10 [II-2] deals exclusively with the law of armed conflict as *lex specialis*, and not with other branches of international law.

(3) Draft principle 10 [II-2] lists some specific principles and rules of the law of armed conflict, namely the principles and rules of distinction, proportionality, military necessity and precautions in attack.[1332] The draft prin-

---

[1326] A similar definition is provided in the following Protocols to the Convention on Certain Conventional Weapons: Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, of 10 October 1980 (Protocol II to the Convention on Certain Conventional Weapons), art. 2, para. 4; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended to the Convention on Certain Conventional Weapons), art. 2, para. 6; and Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the Convention on Certain Conventional Weapons), art. 1, para. 3. See also the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 1 (*f*).

[1327] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 52, para. 1; Protocol II to the Convention on Certain Conventional Weapons, art. 2, para. 5; Protocol II as amended to the Convention on Certain Conventional Weapons, art. 2, para. 7; and Protocol III to the Convention on Certain Conventional Weapons, art. 1, para. 4.

[1328] See, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (footnote 1298 above), rule 7, pp. 25–29. The principle of distinction is codified, *inter alia*, in articles 48 and 52, paragraph 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), as well as Protocol II as amended and Protocol III to the Convention on Certain Conventional Weapons. It is recognized as a rule of customary international humanitarian law in both international and non-international armed conflict.

[1329] The following instruments, *inter alia*, have been cited: Protocol III to the Convention on Certain Conventional Weapons (art. 2, para. 4); the Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (A/49/323, annex); the Final Declaration of the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993 (*International Review of the Red Cross*, vol. 33, No. 296 (September–October 1993), p. 377; General Assembly resolutions 49/50 and 51/157, of 9 December 1994 and 16 December 1996, respectively; the military manuals of Australia and the United States; and national legislation of Nicaragua and Spain. See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (footnote 1298 above), pp. 143–144.

[1330] See, for example, M. Bothe, *et al.*, "International law protecting the environment during armed conflict: gaps and opportunities", *International Review of the Red Cross*, vol. 92, No. 879 (September 2010), p. 569, at p. 576; R. Rayfuse, "Rethinking international law and the protection of the environment in relation to armed conflict", *in* R. Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict* (Leiden, Brill Nijhoff, 2014), p. 1, at p. 6; see also C. Droege and M.-L. Tougas, "The protection of the natural environment in armed conflict–existing rules and need for further legal protection", *ibid*., p. 11, at pp. 17–19; D. Fleck, "The protection of the environment in armed conflict: legal obligations in the absence of specific rules", *ibid*., p. 45, at pp. 47–52; E. V. Koppe, "The principle of ambiguity and the prohibition against excessive collateral damage to the environment during armed conflict", *ibid*., p. 59, at pp. 76–82; and M. Bothe, "The ethics, principles and objectives of protection of the environment in times of armed conflict", *ibid*., p. 91, at p. 99.

[1331] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (footnote 1298 above), p. 143.

[1332] The reference to the rule of military necessity rather than to the principle of necessity reflects the view of some States that military necessity is not a general exemption, but needs to have its basis in an international treaty provision.

ciple itself is of a general character and does not elaborate as to how the principles and rules should be interpreted, as they are well-established principles and rules under the law of armed conflict and it is not the aim of the draft principles to interpret them. They are explicitly included in draft principle 10 [II-2] because they have been identified as being the most relevant principles and rules relating to the protection of the environment in relation to armed conflict.[1333] However, their reference should not be interpreted as indicating a closed list, as all other rules under the law of armed conflict which relate to the protection of the environment in relation to armed conflict remain applicable and cannot be disregarded.[1334]

(4) One of the cornerstones of the law of armed conflict[1335] is the principle of distinction, which obliges parties to an armed conflict to distinguish between civilian objects and military objectives at all times and stipulates that attacks may only be directed against military objectives.[1336] This is considered a rule under customary international law, applicable in both international and non-international armed conflict.[1337] As explained in the commentary to draft principle 9 [II-1], the natural environment is not intrinsically military in nature and should be treated as a civilian object. However, there are certain circumstances in which parts of the environment may become a military objective, in which case such parts may be lawfully targeted.

(5) The principle of proportionality establishes that an attack against a legitimate military target is prohibited if it may be expected to cause incidental damage to civilians or civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.[1338]

(6) The principle of proportionality is an important rule under the law of armed conflict also because of its relation to the rule of military necessity.[1339] It is codified in several instruments of the law of armed conflict,[1340] and the International Court of Justice has also recognized its applicability in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*.[1341] It is considered a rule under customary international law, applicable in both international and non-international armed conflict.[1342]

(7) As the environment is often indirectly rather than directly affected by armed conflict, rules relating to proportionality are of particular importance in relation to the protection of the natural environment in armed conflict.[1343] The particular importance of the principle of proportionality in relation to the protection of the natural environment in armed conflict has been emphasized by the ICRC customary law study, which found that the potential effect of an attack on the environment needs to be assessed.[1344]

(8) If the rules relating to proportionality are applied in relation to the protection of the natural environment, it means that attacks against legitimate military objectives must be refrained from if such an attack would have incidental environmental effects that exceed the value of the military objective in question.[1345] On the other hand, though, the application of the rule also means that "if the target is sufficiently important, a greater degree of risk to

---

[1333] See Rayfuse, "Rethinking international law …" (footnote 1330 above), p. 6; UNEP, *Protecting the Environment During Armed Conflict …* (footnote 1324 above), pp. 12–13.

[1334] These include, *inter alia*, articles 35 and 55 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and other provisions of Protocol I and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), as well as other instruments of the law of armed conflict that may indirectly contribute to protecting the environment, such as those prohibiting attacks against works and installations containing dangerous forces (Protocol I, art. 56; Protocol II, art. 15); those prohibiting attacks on objects indispensable to the civilian population (Protocol I, art. 54; Protocol II, art. 14); the prohibition against pillage (Regulations respecting the laws and customs of war on land annexed to The Hague Convention of 1907 (IV), art. 28); Protocol II, art. 4, para. 2 (*g*); and the prohibition on the forced movement of civilians (Protocol II, art. 17). See also UNEP, *Environmental considerations of human displacement in Liberia: A guide for decision-makers and practitioners* (2006).

[1335] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1313 above), p. 257, para. 78; M. N. Schmitt, "Military necessity and humanity in international humanitarian law: preserving the delicate balance", *Virginia Journal of International Law*, vol. 50, No. 4 (summer 2010), p. 795, at p. 803.

[1336] The principle of distinction is now codified in articles 48, 51, para. 2, and 52, para. 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), and in article 13, para. 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II). See also Protocol II as amended to the Convention on Certain Conventional Weapons; Protocol III to the Convention on Certain Conventional Weapons; and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

[1337] See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (footnote 1298 above), p. 25.

[1338] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 51, para. 5 (*b*). See also Y. Dinstein, "Protection of the environment in international armed conflict", *Max Planck Yearbook of United Nations Law*, vol. 5 (2001), p. 523, at pp. 524–525. See further L. Doswald-Beck, "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *International Review of the Red Cross*, vol. 37, No. 316 (January–February 1997), p. 35, at p. 52.

[1339] Schmitt (see footnote 1335 above), p. 804.

[1340] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), arts. 51 and 57; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II); Protocol II as amended to the Convention on Certain Conventional Weapons; and the Rome Statute of the International Criminal Court, art. 8, para. 2 (*b*) (iv).

[1341] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1313 above), p. 242, para. 30.

[1342] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (see footnote 1298 above), p. 46.

[1343] *Ibid*., p. 150; Droege and Tougas, "The protection of the natural environment in armed conflict …" (see footnote 1330 above), p. 19. See also UNEP, *Desk Study on the Environment in Liberia* (2004); and UNEP, *Environmental considerations of human displacement in Liberia …* (footnote 1334 above).

[1344] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (see footnote 1298 above), rule 44, p. 150.

[1345] See also Dinstein, "Protection of the environment …" (footnote 1338 above), pp. 524–525; Doswald-Beck, "International humanitarian law and the Advisory Opinion of the International Court of Justice …" (footnote 1338 above); UNEP, *Protecting the Environment During Armed Conflict …* (footnote 1324 above), p. 13; Rayfuse, "Rethinking international law …" (footnote 1330 above), p. 6; Droege and Tougas, "The protection of the natural environment in armed conflict …" (footnote 1330 above), pp. 19–23.

the environment may be justified".[1346] It therefore accepts that "collateral damage" to the natural environment may be lawful in certain instances.

(9) Under the law of armed conflict, military necessity allows "measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited".[1347] It means that an attack against a legitimate military objective which may have negative environmental effects will only be allowed if such an attack is actually necessary to accomplish a specific military purpose and is not covered by the prohibition against the employment of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment,[1348] or does not meet the criteria contained in the principle of proportionality.[1349]

(10) The rule concerning precautions in attack lays out that care must be taken to spare the civilian population, civilians and civilian objects from harm during military operations; and also that all feasible precautions must be taken to avoid and minimize incidental loss of civilian life, injury to civilians, as well as damage to civilian objects which may occur. The rule is codified in several instruments of the law of armed conflict[1350] and is also considered to be a customary international law rule in both international and non-international armed conflict.[1351]

(11) The fundamental rule concerning precautions in attack obliges parties to an armed conflict to take necessary and active precautions in planning and deciding on an attack. Therefore, in relation to the protection of the environment, it means that parties to an armed conflict are obliged to take all feasible precautions to avoid and minimize collateral environmental damage.[1352]

(12) Lastly, the words "shall be applied to the natural environment, with a view to its protection" introduces an objective which those involved in armed conflict or military operations should strive towards, and thus it goes further than simply affirming the application of the rules of armed conflict to the environment.

[1346] International Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 19. Available from www.icty.org/x/file/Press/nato061300.pdf. See also Dinstein, "Protection of the environment …" (footnote 1338 above), pp. 524–525.

[1347] M. Sassòli, A. Bouvier and A. Quintin, "How does law protect in war? Online glossary" ("Military necessity"). Available from https://casebook.icrc.org/.

[1348] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 35, para. 3.

[1349] *Ibid*., art. 51, para. 5 (*b*).

[1350] The principle of precautions in attack is codified in article 2, third paragraph, of the Convention (IX) of 1907 concerning Bombardment by Naval Forces in Time of War; article 57, para. 1, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I); Protocol II as amended to the Convention on Certain Conventional Weapons; and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

[1351] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (see footnote 1298 above), rule 15, p. 51.

[1352] *Ibid*., rule 44, p. 147.

Draft principle 11 [II-3]. Environmental considerations

Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

Commentary

(1) Draft principle 11 [II-3] is entitled "Environmental considerations" and provides that environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

(2) The text is drawn from and inspired by the Advisory Opinion of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, which held that: "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."[1353]

(3) Draft principle 11 [II-3] is closely linked with draft principle 10 [II-2]. The added value of this draft principle in relation to draft principle 10 [II-2] is that it provides specificity with regard to the application of the principle of proportionality and the rules of military necessity. It is therefore of operational importance. However, some members suggested that it should be deleted altogether.

(4) Draft principle 11 [II-3] aims to address military conduct and does not deal with the process of determining what constitutes a military objective as such. This is already regulated under the law of armed conflict and is often reflected in military manuals and the domestic law of States.[1354] The words "*when applying* the principle" were specifically chosen to make this point clear. Also, for purposes of clarity and in order to emphasize the link between draft principles 10 [II-2] and 11 [II-3], it was decided to refer explicitly to the principle of proportionality and rules on military necessity. These principles have been discussed in the commentary to draft principle 10 [II-2] above.

[1353] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 1313 above), p. 242, para. 30.

[1354] See the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), arts. 48, 50, 51 (in particular para. 4), 52 (in particular para. 2) and 57, para. 2, and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), art. 13, para. 2. See also Y. Dinstein, "Legitimate military objectives under the current *jus in bello*", *International Law Studies,* vol. 78 (2002), p. 139; and L. R. Blank, "Extending positive identification from persons to places: terrorism, armed conflict, and the identification of military objectives", *Utah Law Review*, No. 5 (2013), p. 1227. See further, for example, United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press, 2004), para. 5.4; Canada, National Defence, *Law of Armed Conflict at the Operational and Tactical Levels* (2001), B-GJ-005-104/FP-021, paras. 405–427; United States Department of Defense, *Law of War Manual* (Washington, D.C., Office of General Counsel, Department of Defense, 2015).

(5) Draft principle 11 [II-3] becomes relevant once a legitimate military objective has been identified. Since knowledge of the environment and its eco-systems is constantly increasing, better understood and more widely accessible to humans, it means that environmental considerations cannot remain static over time: they should develop as human understanding of the environment develops.

Draft principle 12 [II-4]. Prohibition of reprisals

Attacks against the natural environment by way of reprisals are prohibited.

Commentary

(1) Draft principle 12 [II-4] is entitled "Prohibition of reprisals" and is a mirror image of paragraph 2 of article 55 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

(2) Although the draft principle on the prohibition of reprisals against the natural environment was welcomed and supported by some members, other members raised several issues concerning its formulation and were of the view that it should not have been included in the draft principles at all. The divergent views centred around three main points: (*a*) the link between draft principle 12 [II-4] and article 51 of Protocol I; (*b*) whether or not the prohibition of reprisals against the environment reflected customary law; and (*c*) if so, whether both international and non-international armed conflicts were covered by such a customary law rule.

(3) Those who expressed support for the inclusion of the draft principle stressed the link between draft principle 12 [II-4] and article 51 of Protocol I. In their view, article 51 (which is placed under the section "General protection against effects of hostilities") is one of the most fundamental articles of Protocol I. It codifies the customary rule that civilians must be protected against danger arising from hostilities, and, in particular, also provides that "[a]ttacks against the civilian population or civilians by way of reprisals are prohibited".[1355] This made the inclusion of draft principle 12 [II-4] essential. In their view, if the natural environment, or part thereof, became an object of reprisals, it would be tantamount to an attack against the civilian population, civilians or civilian objects, and would thus violate the laws of armed conflict.

(4) In this context, some members took the view that the prohibition of reprisals forms part of customary international law. However, other members questioned the existence of this rule, and were of the view that the rule exists only as a treaty obligation under Protocol I.[1356]

(5) Concerns were raised that including draft principle 12 [II-4] as a copy of article 55, paragraph 2, of Protocol I risked the draft principles going against their main aim, which is to apply generally. Although Protocol I is widely ratified and thus the prohibition of reprisals against the environment is recognized by many States, Protocol I is not universally ratified.[1357] Some members were concerned that reproducing article 55, paragraph 2, verbatim in draft principle 12 [II-4] could therefore be misinterpreted as trying to create a binding rule on non-State parties. It was also pointed out in this regard that paragraph 2 of article 55 has been subject to reservations and declarations by some States parties.[1358]

[1355] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 51, para. 6. See also C. Pilloud and J. Pictet, "Article 51– Protection of the civilian population", *in* Sandoz, Swinarski and Zimmermann (eds.), *Commentary on the Additional Protocols …* (footnote 1301 above), p. 615, para. 1923.

[1356] For a discussion on the customary law status of reprisals, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (footnote 1298 above), pp. 523–530; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden, Martinus Nijhoff, 2009), pp. 285–289; M. A. Newton, "Reconsidering reprisals", *Duke Journal of Comparative and International Law*, vol. 20 (2010), p. 361; S. Darcy, *Collective Responsibility and Accountability Under International Law* (Leiden, Transnational Publishers, 2007) pp. 154–156.

[1357] There are currently 174 State parties to the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). See the ICRC website (www.icrc.org/ihl/INTRO/470).

[1358] For a description of declarations, statements and reservations made by States in connection with regard to, *inter alia*, article 55 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), see the second report of the Special Rapporteur (A/CN.4/685) (footnote 1269 above), paras. 129 and 130. It should also be noted that the United Kingdom declared that: "The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result." The text of the reservation is available from the ICRC website at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2, para. (*m*). The conditions under which belligerent reprisals against the natural environment may be taken are partly described in United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* (see footnote 1354 above), paras. 16.18–16.19.1. For declarations that relate to the understanding of whether Protocol I is applicable only to conventional weapons and not to nuclear weapons, see the second report of the Special Rapporteur (A/C.N/4/685) (footnote 1269 above), para. 130. See declarations and reservations of Ireland: "Article 55: In ensuring that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage and taking account of the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment thereby prejudicing the health or survival of the population, Ireland declares that nuclear weapons, even if not directly governed by Additional Protocol I, remain subject to existing rules of international law as confirmed in 1996 by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. Ireland will interpret and apply this Article in a way which leads to the best possible protection for the civilian population." The declaration is available from the ICRC website, at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification

(6) It is therefore worth summarizing the position of article 55, paragraph 2 (as a treaty provision), as follows: the prohibition of attacks against the natural environment by way of reprisals is a binding rule for the 174 States parties to Protocol I. The extent to which States have made declarations or reservations that are relevant to its application must be evaluated on a case-by-case basis, since only a few States have made an explicit reference to paragraph 2 of article 55.[1359]

(7) Another contentious issue raised which merits discussion is the fact that there is no corresponding rule to article 55, paragraph 2, in article 3 common to the four Geneva Conventions for the protection of war victims or in the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), which explicitly prohibits reprisals in non-international armed conflicts (including against civilians, the civilian population, or civilian objects). The drafting history of Protocol II reveals that at the time of drafting, some States were of the view that reprisals of any kind were prohibited under all circumstances in non-international armed conflicts.[1360] There are, however, also valid arguments that reprisals may be permitted in non-international armed conflicts in certain situations.[1361]

(8) In light of this uncertainty, some members expressed concern that by not differentiating between the position in international armed conflicts and non-international armed conflicts, draft principle 12 would attempt to create a new international law rule. It was therefore suggested that the principle be redrafted with appropriate caveats, or excluded from the draft principles altogether.

(9) Concerning reprisals against the natural environment in particular, it is worth mentioning that the International Tribunal for the Former Yugoslavia considered that the prohibition against reprisals against civilian populations constitutes a customary international law rule "in armed conflicts of any kind".[1362] As the environment should be considered as a civilian object unless parts of it become a military objective, some members expressed the view that reprisals against the natural environment in non-international armed conflicts are prohibited.

(10) Given the controversy surrounding the formulation of this draft principle, various suggestions were made regarding ways in which the principle could be rephrased to address the issues in contention. However, it was ultimately considered that any formulation other than the one adopted was simply too precarious, as it could be interpreted as weakening the existing rule under the law of armed conflict. This would be an undesirable result, given that the existing rule is fundamental to the law of armed conflict. Despite the concerns raised during drafting, including a draft principle on the prohibition of reprisals against the natural environment was viewed as being particularly relevant and necessary, given that the overall aim of the draft principles is to enhance environmental protection in relation to armed conflict. In light of the comments made above, the inclusion of this draft principle can be seen as promoting the progressive development of international law, which is one of the mandates of the Commission.

Draft principle 13 [II-5]. Protected zones

An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

Commentary

(1) This draft principle corresponds with draft principle 5 [I-(x)]. It provides that an area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective. Unlike the earlier draft principle, it only covers areas that are designated by agreement. There has to be an express agreement on the designation. Such an agreement may have been concluded in peacetime or during armed conflict. The reference to the term "agreement" should be understood in its broadest sense as including mutual as well as unilateral declarations accepted by the other party, treaties and other types of agreements, as well as agreements with non-State actors. Such zones are protected from attack during armed conflict. The reference to the word "contain" in the phrase "as long as it does not contain a military objective" is intended to denote that it may be the entire zone, or only parts thereof. Moreover, the protection afforded to a zone ceases if one of the parties commits a material breach of the agreement establishing the zone.

(2) As mentioned above, a designated area established in accordance with draft principle 5 [I-(x)] may lose its protection if a party to an armed conflict has military objectives within the area, or uses the area to carry out

.xsp?action=openDocument&documentId=27BBCD34A4918BFBC1256402003FB43A, para. 11. It should also be noted that in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (see footnote 1313 above), at p. 246, para. 46, the International Court of Justice stated that: "Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality."

[1359] France, Ireland and the United Kingdom.

[1360] See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974–1977), vol. IX, most notably the statements made by Canada (p. 428), the Islamic Republic of Iran (p. 429), Iraq (p. 314), Mexico (p. 318) and Greece (p. 429); available from www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html. See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (footnote 1298 above), p. 528.

[1361] See V. Bílková, "Belligerent reprisals in non-international armed conflicts", *International and Comparative Law Quarterly*, vol. 63 (January 2014), p. 31; S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford, Oxford University Press, 2012), pp. 449–457.

[1362] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, International Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, p. 353, at pp. 475–478, paras. 111–112. See also, in general, Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (footnote 1298 above), pp. 526–529.

any military activities during an armed conflict. The term "military objective" in the present draft principle frames the description of military objectives as "as long as it does not contain a military objective", which is different from draft principle 9 [II-1], paragraph 3, which stipulates "unless it has become a military objective". The relationship between these two principles is that principle 13 [II-5] seeks to enhance the protection established in draft principle 9 [II-1], paragraph 3.

(3) The conditional protection is an attempt to strike a balance between military, humanitarian, and environmental concerns. This balance mirrors the mechanism for demilitarized zones as established in article 60 of Protocol I additional to the 1949 Geneva Conventions. Article 60 states that if a party to an armed conflict uses a protected area for specified military purposes, the protected status shall be revoked.

(4) Under the 1954 Hague Convention referred to above, States parties are similarly under the obligation not to destroy property that has been identified as cultural property in accordance with article 4 of the Convention. However, the protection can only be granted as long as the cultural property is not used for military purposes.

(5) The legal implications of designating an area as a protected area will depend on the origin and contents, as well as the form, of the proposed protected area. For example, the *pacta tertiis* rule will limit the application of a formal treaty to the parties. As a minimum, the designation of an area as a protected zone could serve to alert parties to an armed conflict that they should take this into account when applying the principle of proportionality or the principle of precautions in attack. In addition, preventive and remedial measures may need to be tailored so as to take the special status of the area into account.